

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

77-2107

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SEYMOUR POLLACK,

Petitioner-Appellant,

v.

GEORGE C. WILKINSON, Warden,
Federal Correctional Institution,
Danbury, Connecticut,

Respondent-Appellee.

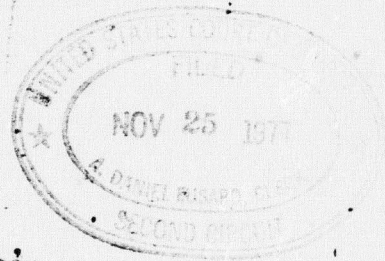
DOCKET NUMBER 77-2107

and appellant
BRIEF ON APPEAL SUBMITTED IN BEHALF OF
SEYMOUR POLLACK, PETITIONER-APPELLANT

SEYMOUR POLLACK, Pro Se

Extended Care Unit 2
F.C.I. Box 2000
Lexington, Kentucky 40511

Dated: November 4, 1977



PAGINATION AS IN ORIGINAL COPY

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It was improper to transfer Petitioner	
when prison authorities were aware that	
a legal action was either pending or	
contemplated to avoid judicial review;	
and	
It was wrong and improper for the lower	
court to dismiss the action as "moot"	
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PRELIMINARY STATEMENT

Seymour Pollack, Petitioner-Appellant, respectfully submits to this Honorable Court that in order to file this brief, he is unable to submit a proper memorandum of law since the law library at the Federal Correctional Institution, Lexington, Kentucky, where he is presently incarcerated, is completely and totally inadequate with no working area, typewriters, material, etc. The situation as it now exists, has and is effectively denying him proper access to this Court.

Numerous complaints were made to the Warden here, and a former legal "intern", Mr. E. J. Walborn, over a year ago advised the Warden of the total inadequacy of the "law library" as to content and even availability of what few books were on hand.

It is clear that the Supreme Court of the United States recognized the right of prisoners to avail themselves of all tools necessary to perfect a legal action: cf. Gilmore v. Lynch, 319 F.Supp. 105, 110 (ND Cal. 1971), affirmed sub nom. Younger v. Gilmore, 404 US 15 (1972), this right reaffirmed most recently in Bounds v. Smith, ___ US ___ (1977); and see also Johnson v. Avery, 393 US 483 (1969). However, since litigation has now been commenced locally in this area, the institution is just now ordering law books and is preparing a "work area" for a "law library". At the present time, inmates have access to a storeroom of about 60 square feet that contain just about 6 or 8 shelves of paperback Federal Supplements and F.2d Series books. Legal research is totally impossible, and even the storeroom is kept locked most of the time.

In view of the above, Appellant must rely on the facts as

they occurred and show the Court that a grave and gross miscarriage of justice occurred in the decision of the Court below.

Petitioner would also request that this Honorable Court both read and judge this brief liberally, and not compel him to meet the same strict standards as one prepared by lawyers (Haines v. Kerner, 404 US 519 (1972)).

STATEMENT OF FACTS

On December 20, 1976, Appellant received a large size manila gummed envelope from his attorney, Lawrence A. Whipple, Jr., and said envelope had literally been torn open and delivered 3 days after its receipt at the Danbury F.C.I. He immediately sent an Inmate Request to see the Warden, Defendant Wilkinson (Exhibit "A"). When he received no response to this request, he sent a letter to Judge Jon O. Newman at the U.S. District Court, District of Connecticut (Exhibit "B"), since Judge Newman had rendered the decision in the case of Stover, et al. v. Carlson, 413 F.Supp. 718 (1976). This letter was sent on January 8, 1977, and its contents are self explanatory.

On January 21, 1977, Warden Wilkinson finally saw Petitioner. At this meeting, Petitioner was told that the envelope had been opened before it arrived at the institution. This was confirmed in the Warden's response: "(1.) Pollack had received a legal size envelope through the mail that had been opened before the Inst. took delivery of the mail." (Exhibit "A"). Petitioner told the Warden that he was told otherwise and intended to file a lawsuit against him. The question of taping calls from "D" Unit was also raised and Petitioner was told to "mind

your own business, or you'll wind up in California."

On February 6, 1977, without notice, Petitioner was told that he was being transferred to the Lexington, F.C.I. and was not even permitted to pack his personal property which he was told would be sent him later. He was flown to Lexington that afternoon.

On February 28, 1977, Judge Robert C. Zampano issued a "show cause" order and thereafter, Respondent submitted a response on March 18, 1977. On March 22, 1977, a supplemental filing to said response was filed. Petitioner filed a traverse to said response on April 14, 1977. Judge Zampano dismissed the complaint as "moot" on July 18, 1977.

ARGUMENT

It is submitted that since Judge Zampano considered Petitioner's letter as a request for issuance of a writ of habeas corpus, and Petitioner's Unit Manager knew of the letter as well as the Warden being told that Petitioner planned a lawsuit, that it was in order to avoid such action that he was "shipped" to Lexington. This action was taken so that it would be prior to any order that such transfer could not be effected as is the custom and possibly law under 28 U.S.C. §2241 et seq.

Petitioner was at the Danbury facility for a period of 8 months and was told that if he so desired, he could be transferred to Lexington. This was many months earlier, and Petitioner chose to remain at Danbury to be near his family. His physical condition was unchanged for a number of months prior to transfer.

There is no argument that prisoners can be transferred at the discretion of the Bureau of Prisons for valid reasons. However, when

such a transfer is made to obstruct justice it is both illegal and causative of simple punitive action.

Petitioner had made specific allegations as to tampering with his mail and "wiretapping" in his letter, and had asked that as per the Stover, supra, decision, Warden Wilkinson be held in contempt of court. Further, the "wiretapping" issue was never denied or referred to in the lower Court's memorandum of decision or judgment. There was a misconstruction as to the relief requested by the lower Court.

Insofar as the factual circumstances involved, it must be seen by this Court that there are major discrepancies in representations and affidavits submitted by Respondent. As the Court has been advised, Warden Wilkinson both told Petitioner orally and in writing that:

"Pollack had received a legal size envelope through the mail that had been opened before the Inst. took delivery of the mail." (emph. added)

In the affidavit submitted to the lower Court, John F. McCarthy, Chief Correctional Officer (Captain) swore that:

"That I was unable to determine how this envelope came to be torn, that the mailroom officer did not recall the envelope being torn prior to being sent out of the mailroom. (emph. added)

Further, Petitioner had made inquiry of the mailroom officer, and in his affidavit attached to his traverse, swore that:

"The mail room officer, when asked by affiant, advised him that the envelope was neither torn or open when it left the mailroom." (emph. added)

Here we have SWORN testimony that the envelope was not torn or open when it left the mail room; yet the Warden stated that it was "opened before the inst. took delivery..."

The only conclusion that can be drawn is that the Warden lied or had to lie to cover up an illegal act or action. The glaring discrepancy if not so tragic, can only be classed as farcical.

As to the charge of "wiretapping", it is submitted that since Respondent entered no denial to this charge; or opposing affidavit to Petitioner's affidavit, that this fact must stand as well pleaded and the doctrine of collateral estoppel would apply. This charge, standing alone, should have precluded any finding of "mootness", since it was a violation of constitutional magnitude and capable of repetition.

Addressing the finding of mootness, Petitioner would simply state that it was in error.

Although Petitioner is a prisoner, he is still guaranteed certain rights of privacy as guaranteed by the Constitution and upheld by Court decisions. These rights include privileged correspondence such as attorney-client, courts, etc. In fact, the Bureau of Prisons own Policy Statement protects this type of communication. Rather than cite all the cases relevant, the Court is asked to read the Stover, supra, decision, attached hereto (Exhibit "C").

Although the usual rule in Federal cases is that an actual controversy must exist at the appellate stage or certiori review and not simply at date of the action, in the case at bar, the Bureau of Prisons was requested by its agent, Warden Wilkinson, to transfer Petitioner. By this action, although the illegal acts of the Respondent are glaring, they are "capable of repetition" yet by the transfer, there was effective evasion of judicial review. This type of action so prevalent in the entire prison system should not be condoned by this Honorable Court.

Petitioner is still in the prison system; and in fact was told that he could still be "shipped back to Danbury". It is very possible that he would be. However, since the actions of Respondent are capable of repetition with many thousands of other citizens, the misconduct claimed must be considered a justiciable issue and provides a classic example and justification for a conclusion of nonmootness.

A landmark case is Roe v. Wade, 93 S. Ct. 705 (1973) and all the cases cited therein. The Roe court used the phrase "presented a justiciable controversy". It is submitted that this cause of action, similarly, since there is no doubt that many members of the "general population" entitled to constitutional protections as applied to prisoners, will be assigned to the Danbury F.C.I.; and since the allegations made are of constitutional dimension and are capable of continual repetitive action, full justification exists for the reversal of the lower court's decision.

Simply stated, the illegal opening of "privileged correspondence" violates Petitioner's and other prisoners' rights of access to and unrefuted the courts; and the undenied/charge of "wiretapping" must stand as well pleaded, and these actions lie fully in the realm of a justiciable controversy. Petitioner's controversial transfer should not be causative of rendering the case at bar "moot".

Prisoners are human beings, not pieces of meat or numbers. Our prison system, as in practice today, are nothing more than cold blooded warehouses of "bodies". If this Court really knew what went on "behind the wall" its conscience would be shocked. The moment a prison official does something wrong and the prisoner even suggests

a court action, he is either threatened, harassed or transferred. Many acts of prison wrongdoing are never brought to light because of the inherent fear instilled in the prisoners of "retaliation". And kid yourselves not, this is cold blooded fact.

The death of the "prisoners" at Danbury was not an accident. It was plain cold blooded murder. It was because of the tremendous overcrowding and dormitory double bunking. Instead of hiring personnel to patrol the prison for just such an emergency, it is common knowledge that hundreds of thousands of dollars were spent in moving the Warden's and Associate Wardens' offices twice in 18 months and lavishly decorating them. The prisoners who perished were human beings; they left wives, children, parents and friends behind. They sinned and were being punished. But, then again, aren't we all sinners? Remember, the Lord created us ALL in his image. Prisons today are nothing more than monuments perpetuating the tragedy of man's inhumanity to man.

The "prisoners" that died have had their "bodies transferred"; although not by a prison official's orders, they are still not there. By analogy, their "cases" or imprisonment now becomes "moot". This is the same rationale employed by the lower court.

It is submitted that when a constitutional violation is charged and the violation is ongoing, then it should be a prime subject for the type of judicial review that the case at bar calls for.

The Court below held no hearing; accepted no evidence and could not have known about the conditions existant. The judgment of "mootness" cannot and must not be permitted to stand since it would give prison authorities the additional protection of the courts to inflict punishment

by transfer on any prisoner who even suggested challenging their dictatorial power and ability to violate constitutionally protected rights.

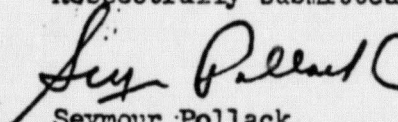
Because of the power the prison authorities have, their threats of transfer or retaliation become very real to a prisoner. And this "power" is constantly expounded upon and if challenged, away you go!

It is inherently wrong that such power be held by people who literally get away with murder as it is. There is no doubt in my mind or in the minds of even prison employees, that illegal surveillance of mail that is privileged and "wiretapping" is in practice in the prison system. As stated in Petitioner's reply brief and affidavit, a Case Manager went outside to use a telephone because he was a union official and believed the phone on the unit was "tapped". This is the same one used by prisoners to call their attorneys.

It is submitted that this type of action denied Petitioner of proper access to the courts and therefore the violation is one of an actual threat to destruction of constitutionally guaranteed rights.

THEREFORE, Petitioner-Appellant requests that this Honorable Court reverse the decision of the lower court and remand this cause of action so that a full hearing could be held on the merits.

Respectfully submitted,


Seymour Pollack
Pro Se

EXHIBITS:

"A" - Danbury Form #051, Request for Interview
(From Seymour Pollack to Warden)

"B" - Letter to Judge Jon O. Newman

APPENDIX:

Order to Show Cause	#1
Response To Order To Show Cause.....	#2
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Traverse to Response.....	#4
Memorandum of Decision.....	#5
Judgment.....	#6

Stover v. Carlson, 413 F.Supp 718 (1976)
(Submitted for reference)#7

FEDERAL CORRECTIONAL INSTITUTION
DANBURY CONNECTICUT

Call at

Supervisor

REQUEST FOR INTERVIEW

NAME POLLACK NO. 40300-133 (P) DATE 12/20/76

QUARTERS _____ DETAIL Education

I RESPECTFULLY REQUEST AN INTERVIEW WITH (CHECK AFTER NAME)*PLEASE PRINT*

WARDEN ☒ CHIEF C & P () PROT. CHAPLAIN ()
ASSOCIATE WARDEN () EDUC SUPVR. () CATH. CHAPLAIN ()
CHIEF CORR. SUPVR. () CHIEF MED. OFF. ()

CLERK WORKER MR. _____ OTHER _____

FOR THE FOLLOWING REASON (MUST BE STATED OR REQUEST WILL BE RETURNED):

1. *Delay and opening & possible examination of legal mail*
2. *Implementation of Bureau of Prisons Policy. Statement #40100.29*
3. *Because of mitigating circumstances request to see [unclear] in next few days. Thompson.*

DETAIL AND/OR QUARTERS COMMENTS:

- 1.) *Pollack has received a legal size envelope through the mail but his supervisor says the institute took possession of the mail*
- 2.) *Policy dealing with a release due to medical reasons.*
- 3.) ? (detail officer must comment if request is for job change)

DATE 12/20/76 SIGNATURE _____

INTERVIEW REMARKS _____

DATE _____ SIGNATURE _____

POSITION Sec 112122 - No change at this time.

FOI EXEMPT

- EXHIBIT "A" -

Yell

Seymour Pollack, #40300-133
Pembroke Station
Danbury, Connecticut 06810

January 8, 1977

Hon. Jon O. Newman, Judge
U.S. District Court, District of Connecticut
141 Church Street
New Haven, Connecticut 06510

Honorable Sir:

This letter is being written to Your Honor to request that a contempt order be issued against any and all parties concerned regarding Your Honor's order in Stover v. Carlson, et al and Liddy v. Wilkinson, et al, Civ. No. 75-292, which order, in essence was to the effect that legal mail may not under any circumstances be opened outside the presence of addressee.

Three times legal mail sent to me, plainly marked as coming from a lawyer, has been opened. The first two times, the regular legal sized envelopes had been neatly slit open, one delivered with my regular mail, and one delivered to me in person. The first two occasions occurred a number of months ago, and I was told that they were opened "in error". I accepted this explanation since the contents were of minor significance and believed that error could have been made. The third letter, however, was a large manila envelope, sent via regular mail, had postage affixed thereto in the amount of \$2.46, was plainly marked as coming from a law firm, and not only was said envelope opened, but not delivered to me until the fourth day after receipt.

This letter was sent to me by Lawrence A. Whipple, Jr., Esq., an attorney at law in Newark, N.J. On the face of the envelope was handwritten "Rec. 12-17-76. 1:06 p.m." and initialled by the mail room officer. On 12-20-76, I was called into the Unit ("D") Manager's office, Mr. D.P. Orr, and given the envelope, I was asked to sign the "Legal Mail Logbook" that I had received this large piece of LEGAL MAIL and Mr. Orr proceeded to initial the back of the envelope. When I saw that the envelope had been literally torn open, I asked Mr. Orr to state this fact in writing on the back of the envelope. This type of envelope is of the self gumming kind, and very difficult to take apart. The entire top of the envelope had been torn open, and then attempt had been made to push it back, which is impossible. Mr. Orr made the notation: "Envelope torn and partially open when received in D Unit" he then signed: "D.P. Orr" directly underneath it. He further marked on the back the date and time of receipt: "12-20-76, 10:55 a.m., D.P. Orr."

On the same day I was able to see the Warden, fleetingly, and told him about this occurrence. He told me to see the Captain and/or A.W. Young, which I did. Then, about a week later, I saw the Captain in the yard and asked him about this incident. He told me it had been sent to the "wrong unit". This past week, I went to the mailroom and saw Officer Kubicek. He told me that the envelope had been sent to "A" Unit by mistake, that the envelope had been sealed when he sent it there and that it had not been returned to him. The usual and actual practice in this Institution is that when mail is sent to the "wrong unit", it is immediately brought by the officer in charge or the Yard Officer to the proper Unit for delivery to the inmate. In this case, this was not done until the 4th day after receipt. The contents of this mail was highly important, containing a handwritten

- EXHIBIT "B" -

affidavit of this Inmate, who is involved in a CRIMINAL PROCEEDING, as well as highly personal documents and exhibits concerning the said affidavit. When I received this envelope, the documents were out of order completely, as if they had just been haphazardly shoved into the envelope.

Additionally, whenever this Inmate has had any occasion and need to call his various attorneys, such as Mr. Whipple or Koskoff and Koskoff in Bridgeport, an officer has ALWAYS been present and listened to said conversations. Because of good reason, I also am strongly led to believe that any and all conversations coming from Unit "D" or going to it, are ~~recorded~~ recorded. As just one reason for this belief, one of the Unit Team, involved in the A.F.G.E. Union here, at all times goes out to the "pay phone" to make local calls.

I feel certain that a full investigation or hearing might prove that, in fact, there is recording being done in this Institution, not only of inmate calls, but those of the staff as well. This type of both monitoring and recording any conversations between clients and attorneys is illegal and a deprivation of not only due process, but actual violation of the law, since no excuse for this type of "surveillance" could even remotely be ascribed to "security reasons".

I Therefore ask Your Honor to order that such type of activities be ordered to cease, and punish all those responsible in defiance of Your Honor's past orders. I further understand, that Judge Zampano has been written a letter by other inmate(s) concerning the fact that Your Honor's order has and is being completely ignored by the officials of this Institution.

If there is any question or doubt as to the statements and beliefs contained herein, then I would respectfully request that Your Honor order an immediate evidentiary hearing in order to ascertain the actual facts and view the evidence submitted.

Your prompt attention to this matter would be greatly appreciated.

Respectfully,

S/ Seymour Pollack

Seymour Pollack

Inmate No. 40300-133

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

1977 3 25 11 11
DISTRICT COURT
DANBURY, CT

SEYMOUR POLLACK,

Petitioner,

v.

GEORGE C. WILKINSON, Warden,
Federal Correctional Institution,
Danbury, Connecticut,

Respondent.

CIVIL NO. B-77-62

ORDER TO SHOW CAUSE WHY A WRIT
OF HABEAS CORPUS SHOULD NOT ISSUE

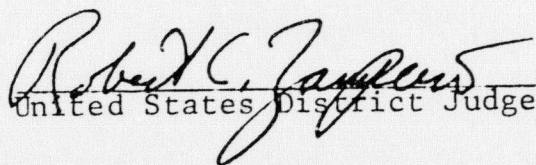
Upon the petition of petitioner, Seymour Pollack,
for issuance of a writ of habeas corpus, it is

ORDERED, that the respondent herein show cause on
or before March 18, 1977, why a writ of habeas corpus
should not issue herein as prayed for in said petition by
filing a return certifying the true cause of the deten-
tion of the petitioner; and it is further

ORDERED, that service by the United States Marshal
of the Order to Show Cause, together with a copy of the
petition, on the respondent George C. Wilkinson, Warden, on
or before March 8, 1977, be deemed sufficient service;
and it is further

ORDERED, that this Order and related documents be
filed by the Clerk of the Court without the payment of the
statutory filing fee, pursuant to the provisions of
28 U.S.C. § 1915.

Dated at New Haven, Connecticut, this 28th day of
February, 1977.


United States District Judge

MICROFILM

MAR 10 1977

BRIDGEPORT

APPENDIX #1

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SEYMOUR POLLACK

:

v.

:

CIVIL NO. B-77-62

GEORGE C. WILKINSON, Warden,
Federal Correctional Institution,
Danbury, Connecticut

:

:

RESPONSE TO ORDER TO SHOW CAUSE

FACTS

major change
Petitioner alleges a tampering with legal mail in December, 1976 at the Federal Correctional Institution at Danbury as well as miscellaneous allegations of monitoring of his conversations.

The petitioner, Mr. Pollack, however, is no longer an inmate at Danbury. For medical reasons, unrelated to the substance of this petition, he has been transferred to the Federal Correctional Institution at Lexington, Kentucky.

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RESPONSE

no complaint

Because petitioner is no longer in custody at Danbury, his complaint as to the conditions attendant thereto is moot. Gogarty v. Wilkinson, Civil No. B-76-340 (Feb. 1, 1977).

In light of its policy of adherence to the mandate of this Court concerning legal mail in Stover v. Carlson, 413 F. Supp. 718 (D. Conn. 1976), however, the respondent makes brief comment on petitioner's principal allegation. According to information transmitted to the United States Attorney's Office by telephone from Captain McCarthy and Mr. Orr, the piece of mail in question arrived at Danbury on Friday afternoon, December 17, 1976 where it was misdirected to Unit A. Upon its rerouting to the correct Unit D (a process that took the weekend) and its receipt by petitioner on Monday morning, December 20, 1976, it was torn somewhat but not opened. Affidavits substantiating this information (as well as petitioner's transfer) are en route and will be forwarded to the Court when received. ?

The respondent respectfully submits that the petition be denied.

Respectfully submitted,

PETER C. DORSEY
UNITED STATES ATTORNEY

BY: Frank H. Santoro

FRANK H. SANTORO

ASSISTANT UNITED STATES ATTORNEY

- APPENDIX #2 -

C E R T I F I C A T I O N

This is to certify that a copy of the within and foregoing
Response to Order to Show Cause has been mailed to Mr. Seymour Pollack,
Pro Se, Federal Correctional Institution, Lexington, Kentucky, this
_____ day of March, 1977.



FRANK H. SANTORO
ASSISTANT UNITED STATES ATTORNEY

OF COUNSEL:

John S. Hahn
Law Student Intern
Pursuant to Local Rule 46(e)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

SEYMOUR POLLACK

:

V.

:

CIVIL NO. B-77-62

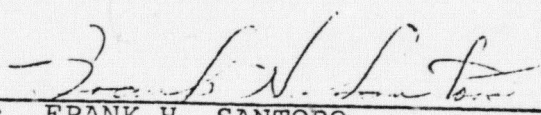
GEORGE C. WILKINSON, WARDEN, :
Federal Correctional :
Institution, Danbury, :
Connecticut :

SUPPLEMENTAL FILING

The Affidavits referred to in the Government's
Response to Order to Show Cause filed on March 18th, 1977,
are attached hereto.

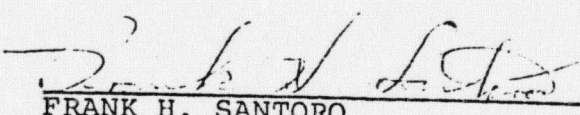
RESPECTFULLY SUBMITTED,

PETER C. DORSEY
UNITED STATES ATTORNEY


BY: FRANK H. SANTORO
ASSISTANT UNITED STATES ATTORNEY

C E R T I F I C A T I O N

This is to certify that a copy of the within and foregoing
Supplemental Response was mailed this 22 day of March, 1977 to:
Mr. Seymour Pollack, c/o Federal Correctional Institution, Danbury,
Connecticut.


FRANK H. SANTORO
ASSISTANT UNITED STATES ATTORNEY

A P P E N D I X # 3

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
DANBURY, CONNECTICUT 06810

U.S. District Court
District of Connecticut

Seymour Pollack - Petitioner

Vs.

George C. Wilkinson, Warden

Civil No. B-77-62

Respondent

State of Connecticut
County of Fairfield

AFFIDAVIT

David P. Orr, of lawful age, having first duty sworn according to law, upon his oath says and deposes.

That I am a Unit Manager at the Federal Correctional Institution, Danbury, Connecticut and was appointed to that position and assumed the responsibility as Unit Manager on March 7, 1976, a portion of my job responsibility requiring me to oversee full casemanagement process of all inmates housed in Unit D.

That I was the Unit Manager on December 20, 1976 and requested POLLACK, Seymour 40300-133 to D-Unit Managers Office at approximately 10:45 A.M.. At that time I did give POLLACK a piece of legal mail that was torn approximately three inches at one end and the remainder was sealed but not tight. Pollack broke the remainder of the seal in my presence and was given the enclosed legal mail.

David P. Orr

David P. Orr
Unit D-Manager

Subscribed and sworn to before me by the above named affiant at my office at the Federal Correctional Institution, Fairfield County, Danbury, Connecticut the 16th day of March 1977.

N. C. Aiello
N. C. Aiello, Administrative Asst.

Authorized by the Act of July 7, 1955, to administer oaths,
Title 18, U.S. Code, Section 4004 (2)

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
DANBURY, CONNECTICUT 06813

U.S. District Court
District of Connecticut

Seymour Pollack - Petitioner
vs
George C. Wilkinson, Warden
Respondent

Civil No. B-77-62

State of Connecticut
County of Fairfield

AFFIDAVIT

I John F. McCarthy, being duly sworn, deposes and say.

That I am employed at the Federal Correctional Institution, Danbury, Connecticut, as Chief Correctional Supervisor and have been so employed since April 1975.

That I had a conversation with Mr. David Orr sometime subsequent to December 20, 1976 and discussed the handling of legal mail addressed to Seymour Pollack, Reg. No. 40300-133 an inmate then incarcerated at the Federal Correctional facility.

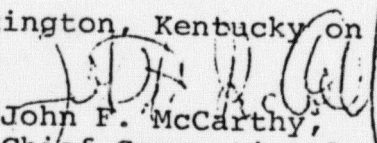
That the mail had been apparently delayed and partially opened prior to delivery. I determined that the mail had been sent to the wrong unit and was delayed in delivery to the proper unit. The envelope was delivered to Pollack with a tear of about three inches along the end.

That I was unable to determine how this envelope came to be torn, that the mailroom officer did not recall the envelope being torn prior to being sent out of the mailroom.

That several days after this I discussed this envelope with Pollack and gave him the above information.

That, the Warden, Federal Correctional Institution has issued explicit and detailed instructions for the handling of legal mail in accordance with the procedure ordered by the Court, and this procedure has been the subject of correctional training and monitoring.

Seymour Pollack was transferred to Lexington, Kentucky on February 7, 1977 for medical reasons.


John F. McCarthy,
Chief Correctional Supr.

Subscribed and sworn to before me by the above named affiant
at my office at the Federal Correctional Institution, Fairfield
County, Danbury, Connecticut the 16th day of
March 1977.


N. C. Aiello, Administrative Asst.

Authorized by the Act of July 7, 1955, to administer oaths,
Title 18, U.S. Code, Section 4004 (2)

SEYMOUR POLLACK,

v.

GEORGE C. WILKINSON, WARDEN,)
FEDERAL CORRECTIONAL INSTITUTION)
DANBURY, CONNECTICUT)

Further, Respondent alleges that Petitioner was transferred for "medical reasons, unrelated to the substance of this petition" It seems strange, that this Petitioner had the same medical condition for a period of eight months and was not transferred. It was only after Petitioner told the Unit Manager Mr.

Orr and Associate Warden Young that he planned on filing a complaint against the Warden, that the transfer was made. Further, Petitioner was told that the officials at the Federal Correctional Institution in Lexington, Kentucky knew well in advance that Petitioner was being transferred, yet Petitioner was never told he was being transferred until hours before transfer was effected. Was it for fear that Petitioner might seek a protective court order?

Concerning the question of mootness, it was not Petitioner's intent to only complain as to the "conditions attendant thereto" (sic F.C.I. Danbury), but to have this Honorable Court make findings of fact as to the allegations of contemptuous conduct on the part of Respondent and his violation of the mandamus edict enunciated in Stover v. Carlson, 413 F. Supp. 718 (D. Conn. 1976) by this Court.

Addressing the mootness issue, a corollary can be drawn between this Petition and Roe v. Wade, 93 S. Ct. 705 (1973). In the Roe case, supra, appellant Roe was pregnant and had attempted to obtain a legal abortion in Texas. At the time of filing her case and for several months thereafter, she had standing to challenge constitutionality of Texas criminal abortion laws. The record did not disclose that she was pregnant at the time of District Court hearing or when the opinion and judgment was filed. The Court found that she presented a justiciable controversy. The Court, in concluding that the termination of her pregnancy did not render the case moot, stated (p. 713(4)):

"Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be capable of repetition, yet evading review.

The court then cited a number of applicable cases, and concluded:

"We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot." [emphasis added]

In the case at bar, Petitioner is still in the Federal prison system; there is a possibility and a fair probability that he may return to the Danbury F.C.I.; there is a positive probability that many members of the "general population" entitled to Constitutional protection will be assigned to the Danbury F.C.I., and since the allegations made, i.e., mail tampering and phone monitoring and/or taping are capable of repetitive action, this is full justification for the nonmootness of this action. Petitioner claims that it lies fully within the realm of a justiciable controversy, and his controversial ^{and} transfer has not_A cannot render this case moot.

Additionally, since Respondent and/or his agents were aware of this Petitioner's filing of a complaint they should not have "transferred" him until the case had been adjudicated. This transfer was made in a possible and probable attempt to "get rid" of Petitioner prior to any order that this Court might issue. Of course, Respondent well knew that once an order was issued, Petitioner could not be transferred. It is this Petitioner's contention that the said transfer was effected in a blatant attempt to circumvent this instant action; remove Petitioner from an area where he could gain outside assistance in this and his other legal proceedings; and "protect" the Respondent from court action and/or punishment.

Therefore, Petitioner respectfully submits that the petition be granted; or, as per contra affidavit attached hereto,

order an evidentiary hearing; and grant whatever further relief
this Honorable Court may deem just and proper.

Respectfully submitted,

Seymour Pollack

Seymour Pollack

Pro Se

DATED: April 14, 1977

STATE OF KENTUCKY)

COUNTY OF FRYETTE)

AFFIDAVIT

Seymour Pollack, Respondent in the above titled action, hereby deposes and says:

(1) That the envelope referred to in the original complaint was torn had been opened when he received same. This envelope is of the new self gumming variety, and once pulled open, is very difficult, if not impossible, to reseal. Attempt was apparently made to "push" the torn flap shut, but this could not be done properly, and this was the reason or excuse presented in the Orr affidavit that it was "sealed, but not tight". With the type of gumming on the flap of this envelope, any undisturbed seal, would create a "tight sealing". However, the actual envelope is the best evidence.

(2) The envelope was marked as received at Danbury, 12-20-76, 1:06 P.M. by mail room officer, and delivered to affiant at 10:55 A.M., 12-23-76.

(3) The mail room officer, when asked by affiant, advised him that the envelope was neither torn or open when it left the mail room.

(4) To affiant's knowledge, since he has personally seen this procedure followed on a number of occasions, any mail sent to a "wrong unit" is taken to the correct unit the same day by the officer in charge; or given to the "yard officer" for delivery to the proper unit. Since all legal mail is logged upon receipt, the envelope referred to in this action would have been immediately seen as being in the wrong unit even before the regular evening mail distribution.

(5) The mail room officer, Mr. Kubicek well knew that affiant was assigned to Unit "D".

(6) Every unit has either a counselor, case manager or unit manager on duty seven days a week. Each one of these are authorized to distribute legal mail. Legal mail is distributed seven days a week. Therefore, it is totally inconceivable or believable that the envelope, if sent to a wrong unit, would lie there unlogged and not delivered to the correct unit within a short period of time--no more, at the very most, than one day.

(7) On two other separate occasions, Affiant received mail, plainly marked as coming from an attorney, that had been "slitted" like regular mail normally is, and stapled to close it. Once, a letter was received in the regular mail and at the other time, the letter was received as legal mail and "logged." This would indicate either negligence, indifference or ulterior purpose. Any one of the three is totally against the mandamus order of this Honorable Court.

(8) Unit "D" Case Manager Paul Smithers, an officer of the A.F.G.E. Union at the Danbury F.C.I., told this affiant when he inquired of him why he was going "outside" to make a local telephone call that he had good reason to believe the unit phone was "tapped". This is the same phone and number that this affiant, as well as all other inmates assigned to Unit "D" use to make calls to attorneys or for emergency situations.

(9) Practically every time that this affiant called his attorneys, an officer remained in the room until the call was completed; logs are kept of these calls; and by an officer's presence, there is no question or doubt of the monitoring claim.

(10) On the day this affiant was told he was being transferred his wife, who had been ill, came to visit him. Mr. Orr went to the visiting room and told her that affiant was "locked up" and was being transferred to Lexington. This was prior to his being told that he had a visitor in the institution, and was not notified of her visit until after she had left the institution. She had to drive well over a hundred miles to visit affiant. Contrary to what affiant's wife was told, he was never "locked up", and did not leave the institution until many hours after his wife had been sent away. This certainly smacks of some sort of plan or intrigue, at the very least.

(11) The medical department and the respondent were well aware of affiant's medical condition for the 8 months prior to his transfer, yet did not transfer him until this matter came up.

(12) It is this affiant's deep feeling and belief that the transfer was effected basically because of the action now pending. Further, he had complained about medical and dental indifference, with instances such as an officer's failure to deliver medication to him at night before bedtime because he was too busy "shaking down" the Catholic Chaplain's office and "confiscating" a small bottle of sacramental wine!

(13) There are other points that affiant cannot swear to at this time, but believes exist contrary to his and other inmates' constitutional rights in this same area.

Seymour Pollack
SEYMOUR POLLACK
Pro Se

CERTIFICATE OF SERVICE

The undersigned, appearing pro se,
in the above-styled civil action, here-
by certifies that he served a true copy
of the foregoing TRAVERSE TO RESPONSE
TO ORDER TO SHOW CAUSE by mailing same
by depositing it in the Prisoner's mail
box to the attorney of record for plain-
tiff, Frank H. Santoro, Assistant U. S.
Attorney, United States Courthouse, New
Haven, Connecticut, this 14th day
of April, 1977.

Seymour Pollack
SEYMOUR POLLACK
Pro Se

Gary D. Gascle
Gary D. Gascle, Case Manager
"Authorized by the Act of July 27, 1955,
to administer oaths (18 U.S.C. 4004)."

UNITED STATES DISTRICT COURT

JUL 15 10 43 AM '77

DISTRICT OF CONNECTICUT

10 43

CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN.

CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN.

Petitioner,

v.

CIVIL NO. B-77-62

GOERGE C. WILKINSON, Warden,
Federal Correctional Institution,
Danbury, Connecticut,

Respondent.

MEMORANDUM OF DECISION

Petitioner, a former inmate at the Federal Correctional Institution, Danbury, ("FCI"), claims that prison officials have improperly handled his legal mail in violation of Judge Newman's order set out in Stover v. Carlson, 413 F. Supp. 716 (D. Conn. 1976). He now seeks a further order directing full compliance with that opinion.

Since the filing of this action, petitioner has been transferred to Lexington, Kentucky for medical reasons; the issue of handling of his mail at Danbury, therefore, is moot. However, in an affidavit filed in support of the government's position, John F. McCarthy, the Chief Correctional Supervisor, indicated that the Warden at the FCI has issued explicit and detailed instructions for the handling of legal mail in accordance with the procedure ordered by the Court, and that this procedure is the subject of correctional training and monitoring. The Court calls attention to that procedure and assumes that officials at Danbury will do their utmost to comply.

Accordingly, under all the circumstances, the petition

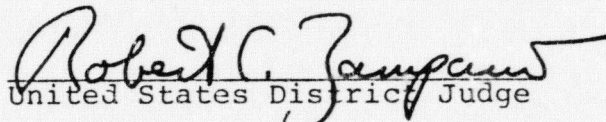
Exhibit
5

is dismissed as moot.

Dated at New Haven, Connecticut, this

13th

day of July, 1977.


United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JUL 18 4 22 PM '77

CLERK
U.S. DISTRICT COURT
BRIDGEPORT, CONN.

SEYMOUR FOLLACK

v.

CIVIL #B-77-62

GEORGE C. WILKINSON, Warden,
Federal Correctional Institution,
Danbury, Connecticut

JUDGMENT

This cause came on for consideration on a Petition For A Writ Of Habeas Corpus and the Court having filed its Memorandum Of Decision under date of July 15, 1977, dismissing said petition for mootness,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the respondent and the Petition For A Writ Of Habeas Corpus is dismissed as moot.

Dated at Bridgeport, Connecticut, this 18th day of July, 1977.

SYLVESTER A. MARKOWSKI, Clerk

By:

Lura B. [Signature]
Deputy Clerk

Exhibit
#6

The respondent vigorously opposes expungement because 1) the hospital records accumulated during Souder's three-year stay at Farview may be necessary for future treatment of petitioner should he be legally committed or voluntarily seek treatment, and 2) there is no injury to Souder by the continued maintenance of his hospital records, especially in light of 50 P.S. § 4602,⁸ which limits the availability of such records. The propriety of expungement is further complicated by the recent decision in *Wolfe v. Beal*, Pa.Cmwlth., 353 A.2d 481, 1976, holding that the destruction of statutorily mandated state mental hospital records of a citizen unconstitutionally committed is not within the court's authority.

We hesitate to reach this question without availing counsel of the opportunity to more fully express their thoughts on the matter. Furthermore, assuming expungement is warranted, we are unaware of the contents of Souder's hospital records, and therefore we are in no position to frame an expungement order which would assure the availability of those records relevant to the pending civil suit. Accordingly, a decision on Souder's request for expungement will be held in abeyance pending further briefing and the arguments of counsel.

*If not knew about
complaint, in order to
avoid action, ship inmate
out prior to order that
may issue. Once order
issued, precluded
28 U.S.C. check habe dec.
12 or 12241*

8. 50 P.S. § 4602(d) provides:

"Records of persons admitted or committed
"(d) Any record, or portion thereof, so maintained shall be open to inspection and examination only to those persons designated by the director of a facility at which such person has

Richard Dale STOVER et al.

v.

Norman CARLSON, Director, United
States Bureau of Prisons, et al.

Civ. No. B-75-290.

United States District Court,
D. Connecticut.

April 29, 1976.

Federal prisoners brought action to challenge procedures employed by prison officials in distributing incoming inmate mail. The District Court, Newman, J., held that a Bureau of Prisons regulation which permits correspondence addressed to an inmate by an attorney to be opened in the presence of the inmate solely for the purpose of inspection for contraband fell within constitutionally permissible surveillance of attorney-client mail; that prison officials were required to enforce the Bureau of Prisons regulation pertaining to attorney-client mail as written and, therefore, to treat as privileged all mail which indicates on its face in any manner that it is sent by an attorney; that prison officials were required to treat as privileged mail from state courts; that prison officials were also required to treat as privileged and to open only in the presence of the inmate addressee mail with a Department of Justice return address or the return address of a state or local prosecutor and mail bearing a state governor's return address; that prison officials were required to treat as privileged communications with foreign embassies; and that inmates were not entitled to an order requiring prison officials to treat as privileged mail from federal, state, or local agencies with no obvious relationship to the inmate's incarceration.

Ordered in accordance with opinion.

See also, D.C., 413 F.Supp. 724.

been admitted or committed or at which he is receiving services or benefits, and as to those facilities under the control of the Commonwealth of Pennsylvania or local authorities to such other persons as the secretary by regulation may determine."

— APPENDIX #9 —

1. Mandamus ⇐ 80

Whether improper treatment of privileged mail by federal prison officials is characterized as accidental or purposeful, writ of mandamus may issue to compel prison officials to comply with provision of Bureau of Prisons policy statement which directs that mail from United States courts and from members of Congress "will be opened and inspected only in the presence of the inmate, and only for the purpose of detecting enclosures constituting contraband."

2. Prisons ⇐ 4

Even when accidental, it is improper for federal prison officials to deviate from standard imposed by Bureau of Prisons policy statement pertaining to the opening of mail from United States courts and members of Congress. U.S.C.A.Const. Amends. 1, 6.

3. Prisons ⇐ 4

Effective access to courts as guaranteed by the Sixth Amendment is deterred whenever privileged mail from United States courts is opened by prison officials outside the inmate's presence, whatever the official's motivation might be for opening the mail. U.S.C.A.Const. Amends. 1, 6.

4. Mandamus ⇐ 176

In view of fact that Bureau of Prisons policy statement pertaining to privileged mail imposes a mandatory duty on federal prison officials and that it would not unduly burden prison officials to reduce the number of improper openings of privileged mail to a truly unavoidable margin of inevitable mistake, it was appropriate that writ of mandamus issue to compel officials of federal correctional institution to perform the duty owed to inmates to open privileged mail only in the inmate's presence. U.S.C.A.Const. Amends. 1, 6.

5. Prisons ⇐ 4

Bureau of Prisons policy statement which provides that correspondence ad-

mitted to an inmate by an attorney may be opened in the presence of the inmate solely for the purpose of inspection for physical enclosures constituting contraband falls well within constitutionally permissible surveillance of attorney-client mail. U.S.C.A. Const. Amends. 1, 5, 6, 14.

6. Prisons ⇐ 4

Notwithstanding fact that there may be justification for federal correctional institution's practice of not placing mail from attorneys in privileged category unless it bears a special marking, where applicable Bureau of Prisons regulation failed to put either the client or the attorney on notice that such a special marking was required in order to qualify mail for privileged treatment, prison authorities were required to enforce the regulation as written and to treat as privileged all mail which indicates on its face in any manner that it is sent by an attorney.

7. Constitutional Law ⇐ 305(2), 328

The right of effective access to the courts is protected by the Sixth and Fourteenth Amendments. U.S.C.A.Const. Amends. 6, 14.

8. Prisons ⇐ 4

In view of fact that right of effective access to courts is constitutionally protected, danger that an envelope bearing the return address of a state court might contain something other than legitimate mail from that court was not sufficiently substantial to justify the general opening of such mail outside the presence of the inmate of a federal correctional institution. U.S.C.A.Const. Amends. 1, 5, 6, 14.

9. Prisons ⇐ 4

In view of fact that no substantial government interest is furthered and Sixth Amendment freedoms are significantly limited by federal correctional institution's practice of excluding envelopes bearing return address of a state court from privileged classification, such mail must be

treated as privileged and opened only in the presence of the inmate. U.S.C.A.Const. Amend. 6.

10. Prisons ⇐ 4

In view of heavy reliance by courts on administrative procedures and because correspondence with Department of Justice or state and local prosecuting authorities may be as intimately related to the right of access to the courts as is correspondence with a private attorney, mail with a Department of Justice return address or the return address of a state or local prosecutor may not be opened by federal prison authorities outside the presence of the inmate. U.S.C.A.Const. Amends. 1, 5, 6, 14.

11. Prisons ⇐ 4

In view of fact that a prisoner has an immediate interest in communications from a state governor, mail bearing a state governor's return address may not be opened by federal prison officials outside the inmate's presence. U.S.C.A.Const. Amends. 1, 5, 6, 14.

12. Prisons ⇐ 4

In view of fact that communications with foreign embassies may directly concern a prisoner's incarceration, mail from a foreign embassy may not be opened by federal prison officials outside the presence of the inmate.

13. Prisons ⇐ 4

Federal correctional institution inmates were not entitled to an order requiring that mail from federal, state, or local agencies with no obvious relation to an inmate's incarceration be opened only in the inmate's presence.

14. Mandamus ⇐ 80

Mandamus is available to grant relief against federal prison officials to redress a constitutional violation.

Richard Dale Stover, pro se; Jerome N. Frank Legal Service Organization, New Haven, Conn., for plaintiff.

Peter A. Clark, Asst. U. S. Atty., Jerimiah Donovan, New Haven, Conn., for defendants.

MEMORANDUM OF DECISION

NEWMAN, District Judge.

This lawsuit involves a broad challenge to the procedures employed by prison officials at the Federal Correctional Institution, Danbury, to distribute incoming inmate mail. The plaintiffs are in the custody of the United States Attorney General and are incarcerated at the Danbury facility. Jurisdiction is grounded on 28 U.S.C. § 1361 and 28 U.S.C. § 2241.

Three claims have been made concerning the prison mail-handling techniques. Plaintiffs contend, first, that staff at FCI, Danbury, frequently violate the Bureau of Prisons Policy Statement 7300.1A(6)(b) (Mar. 16, 1972) insofar as it requires mail from United States Courts, Members of Congress, and attorneys to be opened only in the presence of the addressee. Secondly, they argue that staff at FCI, Danbury, are violating the Policy Statement by opening mail from attorneys out of the presence of inmates unless it is specially marked with some legend identifying it as attorney-client mail. Thirdly, the plaintiffs argue that the Policy Statement itself violates their constitutional rights by permitting the opening outside the presence of the inmate of mail from the executive branches of the Federal Government and the states, from state courts, and from state legislators.

At a hearing on the merits it was established that mail coming to FCI, Danbury, is received in a mail room to which one or two officers are assigned on a rotating basis. An officer first screens the incoming mail to segregate all letters from United States Courts and Congressmen and envelopes bearing a legend identifying mail as attorney-client. Privileged letters are forwarded to an inmate's Case or Unit Manager who opens the envelope in the inmate's presence to search for contraband without reading the content of the mail. Non-privileged mail is slit open by machine outside the inmate's presence and randomly searched for contraband. Prison authorities claim not to read the contents of such mail.

I.

The first dispute between the parties is the extent to which the specified mail-opening procedure is not followed, and whether departures are intentional or accidental. The government contends that occasionally mail from the privileged class is accidentally placed with the non-privileged mail and opened by machine out of the inmate's presence. Plaintiffs allege that these openings are purposeful and that the mail is read by prison officials before delivery.

[1-3] Whether the improper treatment of privileged mail is characterized as accidental or purposeful, a writ of mandamus may issue to compel a government officer to comply with a specific regulatory direction. *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328, 334 (2d Cir. 1974); *Chaudoin v. Atkinson*, 494 F.2d 1323, 1330 (2d Cir. 1974); *Feliciano v. Laird*, 426 F.2d 424, 429 (2d Cir. 1970). Bureau of Prisons Policy Statement 7300.1A(6)(b) imposes a specific duty upon prison officials: "Mail from U.S. Courts and Members of Congress will be opened and inspected only in the presence of the inmate, and only for the purpose of detecting enclosures constituting contraband." (emphasis added). Deviation from this standard is improper even when accidental. The inmate's Sixth Amendment right of access to the courts is "chilled" whatever may be the motivation for the opening of mail from courts by prison officials. See *Smith v. Robbins*, 328 F.Supp. 162, 165 (D.Me.1971), *aff'd in part, vacated in part*, 454 F.2d 696 (1st Cir. 1972). It is the fact of the opening outside the inmate's presence, not the official's motivation, that deters effective access to the courts. *Goodwin v. Oswald*, 462 F.2d 1237, 1245 (2d Cir. 1972); *Smith v. Robbins*, *supra*, 454 F.2d at 697.

[4] The Bureau of Prisons Policy Statement recognizes the significance of the fact of the opening outside the inmate's presence by imposing a mandatory duty upon prison officials. The mail room officer testified that during the Christmas peak mailing season the prison handled approximately 3,000 pieces of mail a day, but the plain-

tiffs contend that the yearly average is less than one-third that amount. There appear to have been over 100 improper openings before and during the pendency of this lawsuit. The Court is not convinced, even accepting the defendants' estimate of mail inflow, that the number of improper openings of privileged mail cannot be eliminated or greatly reduced to a truly unavoidable margin of inevitable mistake without unduly burdening the prison officials. A writ of mandamus will issue to compel the defendants to perform the duty owed to the plaintiffs. If compliance with the writ requires that an additional officer be placed in the mail room when mail is heavy or that the officer presently assigned be instructed to perform his duties more carefully, the burden on the defendants is not excessive. See *Bach v. Illinois*, 504 F.2d 1100, 1102 (7th Cir. 1974) (*per curiam*); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974).

II.

[5] A closer question concerns the local practice of not placing mail from attorneys in the privileged category unless it bears a special marking, beyond the identification that appears from the return address. Bureau of Prisons Policy Statement 2001-2B(10)(b) provides that "Correspondence addressed to an inmate by an attorney may be opened in the presence of the inmate solely for the purposes of inspection for physical enclosures constituting contraband." The regulation falls well within the constitutionally permissible surveillance of attorney-client mail. *Wolff v. McDonnell*, 418 U.S. 539, 576-77, 94 S.Ct. 2963, 2984-85, 41 L.Ed.2d 935, 962-63 (1974); *Morgan v. Montanye*, 516 F.2d 1367, 1372 (2d Cir. 1975), *rehearing en banc denied*, 521 F.2d 693; *cf. Inmates of Milwaukee County Jail v. Petersen*, 353 F.Supp. 1157, 1168 (E.D.Wis.1973). Testimony revealed that attorney-client mail is not treated as privileged unless it is specially stamped "attorney-client" by the sender. Yet the Bureau of Prisons regulation fails to put either the client or the attorney on notice that such a special marking is required in order to qualify the mail for privileged treatment.

[6] There may be justification for the prison's practice of requiring a special indication that an attorney considers mail privileged, rather than merely treating every letter with an attorney's return address as *per se* privileged. Cf. *Marsh v. Moore*, 325 F.Supp. 392, 395 (D.Mass.1971). Traffic in contraband is proscribed by 18 U.S.C. § 1791, and the Bureau of Prisons may consider it appropriate to force an individual who is considering sending contraband under the guise of attorney-client mail to take one more affirmative step so that the individual may have one more opportunity to consider the gravity of his offense. Additionally, some communications between an individual who is an attorney and an inmate may not be subject to the privilege, and the Bureau of Prisons is certainly free to relieve some of its burden of special mail handling by placing the responsibility for identifying privileged communications upon the attorney. *Wolff v. McDonnell*, *supra*, 418 U.S. at 576-77, 94 S.Ct. at 2984-85, 41 L.Ed.2d at 962-63.

Presently, however, the Bureau of Prisons regulation fails to alert anyone to the necessity for special marking, which FCI, Danbury, is requiring. The regulation should be enforced as presently written, *i. e.*, all mail should be treated as privileged if it indicates on its face in any manner that it is sent "by an attorney." The return address of a sender identified as an attorney or a law firm is sufficient. More precise markings may not be required by a local institution, unless and until the Bureau of Prisons chooses to so specify in a new policy statement. Accordingly, a writ of mandamus will issue to compel the prison authorities to adhere to the present regulation.

III.

Plaintiffs' third contention is that the categories of mail treated as privileged must be expanded to include mail from foreign officials, state and federal executive officials, state courts, and all local municipal officials and employees. Plaintiffs maintain that the First, Fifth, and Sixth Amendments protect these classes of mail

from being opened outside the presence of the inmate.

[7-9] The contention that mail from state courts should be treated as privileged presents the most persuasive constitutional argument. The Sixth and Fourteenth Amendments protect the right of effective access to the courts. *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); *Ex Parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941); *Adams v. Carlson*, 488 F.2d 619, 630-31 (7th Cir. 1973); *Corby v. Conboy*, 457 F.2d 251, 253 (2d Cir. 1972); *Sostre v. McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971); *Worley v. Bounds*, 355 F.Supp. 115, 118-19 (W.D.N.C.1973). When mail from any court is opened outside the presence of the inmate, and the inmate knows that such mail may be read by prison officials, the "chilling effect" on the right of access to the courts is substantial. See *Coleman v. Peyton*, 362 F.2d 905, 907 (4th Cir. 1966). The danger that an envelope bearing the return address of a state court will contain something other than legitimate mail from that court is not significant enough to justify the deterrent effect of the general opening of such mail outside the presence of the inmate. Applying the test enunciated by the Supreme Court in *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800, 1811, 40 L.Ed.2d 224, 240 (1974), to this constitutional problem, the Court finds that the exclusion of envelopes bearing the return address of a state court from the privileged classification furthers no substantial governmental interest of security, order, or rehabilitation while limiting Sixth Amendment freedoms significantly. Such mail must be opened only in the presence of the inmate. See *Adams v. Carlson*, *supra* at 631; *Smith v. Robbins*, *supra*, 454 F.2d at 697; *Carothers v. Follette*, 314 F.Supp. 1014, 1022 (S.D.N.Y.1970).

The remainder of plaintiffs' claims are less firmly anchored in the mainstream of currently enunciated constitutional doctrine. Justices Marshall and Douglas have eloquently argued that the First Amendment prohibits prison authorities from opening and reading any incoming and out-

going prisoner mail, *Wolff v. McDonnell*, supra 418 U.S. at 601, 94 S.Ct. at 2996, 41 L.Ed.2d at 976 (Douglas, J. dissenting in part); *Procunier v. Martinez*, supra, 416 U.S. at 422-429, 94 S.Ct. at 1815-19, 40 L.Ed.2d at 245-49 (Marshall, J. concurring and Douglas, J. concurring), but that view has not prevailed, *Procunier v. Martinez*, supra at 413, 94 S.Ct. at 1811, 40 L.Ed.2d at 240.

[10] Whatever may be the scope of protection afforded incoming inmate mail in general by the First Amendment, the heavy reliance by the courts upon administrative procedures dictates, under the standards of *Procunier v. Martinez*, supra, that the channels of communications to and from those agencies with important and immediate responsibility for the fact of an inmate's incarceration remain entirely free of prison staff surveillance, except for the minimum intrusion of opening in the inmate's presence to check for contraband without reading contents.¹ Thus, correspondence with the Department of Justice or state and local prosecuting authorities is as intimately related to the right of access to the courts as is correspondence with a private attorney. A prisoner may be involved in negotiations with a government attorney concerning past or future prosecutions, or may be complaining to some official in the Justice Department concerning conditions at the prison. Opening of mail from Justice Department personnel or other prosecuting officials outside the presence of the inmate effectively chills access to a governmental entity that is intimately related to the administration of justice. Indeed, other prison officials have recognized the prisoner's interest in the integrity of such communica-

tion and amended mail regulations to provide that such communication may only be screened for contraband in the inmate's presence. *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir. 1975); *Bach v. Coughlin*, 508 F.2d 303, 307 (7th Cir. 1974); *Lake v. Lee*, 329 F.Supp. 196 (S.D.Ala.1971). Mail with a Department of Justice return address or the return address of a state or local prosecutor may not be opened outside the presence of the inmate.

[11] Similarly, a prisoner has an immediate interest in communications from a governor since these communications will often deal with extradition problems. A governor has the power to reach a decision that will immediately affect the inmate's incarceration and therefore mail bearing a state governor's return address may not be opened outside the inmate's presence.

[12] Communications with foreign embassies also directly concern a prisoner's incarceration. In the case of a foreign national detained in federal custody, that individual surely has a right to communicate with his government in order to persuade it to take some official action on his behalf. Consequently, mail from a foreign embassy may not be opened outside the presence of the inmate, lest the inmate be afraid to engage in such correspondence for fear that prison officials will take some action against the inmate because of the contents of some letter.

[13] However, the balance indicated by *Procunier v. Martinez*, supra, is not met as to mail from federal, state, or local agencies with no obvious relationship to the inmate's incarceration. To the extent plaintiffs seek to require mail from these agencies to be

1. Judge Oakes has recently urged that our Circuit re-examine *Sostre v. McGinnis*, insofar as it grants prison authorities power to interfere with inmate's attorney-client mail. *Morgan v. Montanye*, supra, 521 F.2d 693 (Oakes, J. dissenting from denial of rehearing en banc). Yet even *Sostre* recognizes that "Sui generis in both logic and the case law, however, are letters addressed to courts, public officials, or an attorney when a prisoner challenges the legality of either his criminal conviction or the conditions of his incarceration. It would be

inappropriate on constitutional grounds, ironic, and irrational to permit drastic curtailment of constitutional rights in the name of punishment and rehabilitation, while denying prisoners a full opportunity to pursue their appeals and postconviction remedies. The general scope of discretion accorded prison authorities also heightens the importance of permitting free and uninhibited access by prisoners to both administrative and judicial forums for the purpose of seeking redress of grievances against state officers." *Id.* at 200.

opened in their presence, the request is denied.

[14] Accordingly, a writ of mandamus will issue directing the warden of the Federal Correctional Institution at Danbury and those officials acting under his supervision (1) to adhere to Bureau of Prisons Policy Statement 7300.1A(6)(b) (Mar. 16, 1972) insofar as it requires mail from United States Courts, Members of Congress, and attorneys to be opened only in the presence of the inmate addressee, (2) to include within this privileged category of mail any letter that indicates on its face in any manner that it is sent by an attorney, including a letter with a return address identifying the sender as an attorney or a law firm, and (3) to include within the category of privileged mail that can be opened only in the presence of the inmate addressee any mail indicating on its face that the sender is a state court or official thereof, the United States Department of Justice or state or local prosecutor's offices, or official thereof, the office of a state governor or official thereof, or the embassy or consulate of a foreign country or official thereof.²



G. Gordon LIDDY et al.

v.

George C. WILKINSON, Warden, Federal
Correctional Institution, Danbury,
Connecticut.

Civ. No. B-75-290.

United States District Court,
D. Connecticut.

April 29, 1976.

Two federal correctional institution inmates brought action for injunctive relief

2. Relief in this third category is to redress a constitutional, rather than a regulatory violation, and mandamus is available to grant relief against prison officials in this situation. *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975).

to prevent recurrence of allegedly retaliatory actions taken against them by prison officials. The District Court, Newman, J., held that when an inmate is placed in administrative detention, including when such placement is pending a hearing for violation of regulations, a memorandum detailing the reason for such placement must be prepared in accordance with the Bureau of Prisons policy statement, notwithstanding the fact that an incident report has also been prepared; that an inmate may not be required to return a copy of an incident report which he has been given; and that, absent justifying circumstances, personnel assigned to a prison law library should not be reassigned if such reassignment will result in a curtailing of the law library services.

Ordered in accordance with opinion.

1. Prisons ⇌ 13

Preparation by federal prison officials of an "incident report" as required by the Bureau of Prisons policy statement does not satisfy the additional policy statement requirement that whenever an inmate is placed in administrative detention, including such placement pending a hearing, a memorandum detailing the reason for such placement be prepared and given to members of the inmate's unit or team with a copy to the operations supervisor.

2. Prisons ⇌ 13

Strict adherence to requirements concerning special forms of custody within a federal correctional institution cannot be dispensed with simply because prisoners are already within the confines of a penal institution.

3. Prisons ⇌ 13

In view of fact that Bureau of Prisons policy statement provides that an inmate who is charged with a violation of rules

In any event, habeas corpus jurisdiction is sufficient for injunctive relief, and clarity is achieved by including all three grants of relief in one order.

1. App; cell c; inmat; tier is; custod; third; althou

Certificate Of Service

Seymour Pollack, the Appellant in the enclosed styled action, hereby certifies that he has served a copy of the within Appeal Brief by depositing same in the Prisoners' Mail Box, F.C.I., Lexington, Kentucky this 12th day of November, 1977.

Said copy was sent to the attorney of record of Appellee, Frank H. Santoro, Esq., Assistant United States Attorney, United States Courthouse, New Haven, Connecticut.

A handwritten signature in cursive script, appearing to read "Sey Pollack", written in dark ink.

Seymour Pollack

